

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

Date: **AUG 26 2011** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Derry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT consulting and software development firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered on the labor certification did not require a member of the professions holding an advanced degree or an alien of exceptional ability as indicated on the Form I-140, Immigrant Petition for Alien Worker.

On appeal, counsel asserts that the designation of the advanced degree visa classification was a typographical error and that the petition merits approval.

For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

Section 203(b) of the Act states in pertinent part that:

- (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
 - (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose

¹The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.²**

(Bold emphasis added.)

Here, the Form I-140 was filed on October 20, 2008. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. The accompanying labor certification establishes that the priority date is February 28, 2008.³

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the

²There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, the ETA Form 9089 replaced the Form ETA 750 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

³ The petitioner must establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date. The petitioner must also establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on February 28, 2008 which establishes the priority date. The proffered wage as stated on Part G of the ETA Form 9089 is set forth as a range from \$55,000 to \$70,000 per year. The ETA Form 9089 indicates that the petitioner employed the beneficiary beginning on February 1, 2006 (to the date of signing the ETA Form 9089 on August 1, 2008).

terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's in Computer Science
- H.5. Training: n/a
- H.6. Experience in the job offered: 12 months
- H.7. Alternate field of study: Mathematics, Engineering, Information Systems
- H.8. Alternate combination of education and experience: Master's and 0 (yrs.) experience
- H.9. Foreign educational equivalent: Accepted
- H.10. Experience in an alternate occupation: 12 months Computer Programmer /Systems Analyst/Software Engineer
- H.14. Specific skills or other requirements: n/a

As set forth above, the minimum level of education and experience acceptable to the petitioner is a Bachelor's degree in Computer Science or Mathematics, Engineering, Information Systems and 12 months of experience in the job offered as a programmer analyst or 12 months of experience as a computer programmer, systems analyst or software engineer. Alternatively, the applicant may have a Master's degree and no experience.

On appeal, counsel asserts that the petitioner's prior counsel mistakenly designated the EB-2 visa classification and intended to select the third preference classification (paragraph e) on the Form I-140. Counsel states that the petition should be approved using the correct category of EB-3.⁴

⁴Third preference visa classification includes professionals or skilled workers. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also*, 8 C.F.R. § 204.5(l)(2). Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also*, 8 C.F.R. § 204.5(l)(2).

A copy of a letter from prior counsel affirms that miscommunication with the petitioner resulted in the selection of the wrong category.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Because the minimum level of education described in the certified ETA Form 9089 is only a Bachelor's degree with one year of experience⁵ and not an advanced degree, the job offer portion of the individual labor certification, fails to demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability. Therefore it fails to comply with the requirements of 8 C.F.R. § 204.5(k)(4). The petition may not be approved as an advanced degree professional. Further, there is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Beyond the decision of the director, it is noted that the petition is not eligible for approval because the petitioner failed to establish its continuing ability to pay the proffered wage pursuant

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 at 145 (AAO's *de novo* authority is well-recognized.).

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the

⁵ It appears the petitioner seeks to rely on the beneficiary's Master's degree. Nothing in the record shows that the beneficiary meets the primary education and experience requirement of a Bachelor's degree and one year of experience.

form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As noted above, the petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage from the priority date onward, which is February 28, 2008 in this case.

In reviewing a petitioner's ability to pay the proffered wage, USCIS will examine a petitioner's net income, net current assets⁶ and whether and to what extent the petitioner has employed and paid

⁶Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and

wages to the beneficiary. If a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given period, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As

profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

noted above, although the ETA Form 9089 indicates that the petitioner has employed the beneficiary, the record contains no evidence of any wages paid to the beneficiary.

The only financial information submitted in support of the petitioner's continuing ability to pay the proffered wage of \$55,000 to \$70,000 per year, is a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2006. Since the priority date in this case is February 28, 2008, a 2006 tax return is not probative of the ability to pay the proffered salary beginning on the priority date.⁷ The petitioner has failed to demonstrate that it has had the continuing ability to pay the proffered wage from the priority date onward.

Based on a review of the underlying record and the evidence submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for an advanced degree professional originally sought by the petitioner. Additionally, the petitioner failed to demonstrate that it has the continuing ability to pay the proffered wage from the priority onward. The petition will be denied for these reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁷*Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere.

As the record is devoid of any evidence of the petitioner's continuing ability to pay the proffered wage as of the priority date of February 28, 2008, the *Sonegawa* factors such as uncharacteristic losses, factors of outstanding reputation or other circumstances are not contained in the record in this case and cannot be assessed.